Filed 3/26/19 Davis v. Mongeon CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DOYLE WAYNE DAVIS, Plaintiff and Appellant, v. ROBERT L. MONGEON et al., Defendants and Respondents.	D073165 (Super. Ct. No. 37-2017-00014381-CU-MM-CTL)

APPEAL from judgments of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Doyle Wayne Davis, in pro. per., for Plaintiff and Appellant.

Schmid & Voiles, Denise H. Greer and Catherine M. Schroeder for Defendant and Respondent Stoimen S. Evtimov, M.D.

G&P Schick, Malcolm D. Schick and Douglas S. Rafner for Defendant and Respondent Robert L. Mongeon, M.D.

I.

INTRODUCTION

In April 2017, Doyle Wayne Davis, an incarcerated and self-represented litigant, filed this action against numerous defendants, including respondents, Dr. Robert Mongeon and Dr. Stoimen Evtimov.[1] In his complaint, Davis alleged three causes of action, styled as "general negligence," "intentional tort," and "deliberate indifference to severe medical condition." (Capitalization omitted.) The causes of action were all based on allegations related to respondents' provision of medical care to Davis while he was incarcerated. In July 2017, Dr. Mongeon and Dr. Evtimov each filed a demurrer to the complaint. Davis did not oppose the demurrers, and the trial court granted the demurrers with leave to amend. After Davis failed to file an amended complaint, Mongeon and Evtimov each filed an application to dismiss the action. The trial court subsequently entered orders dismissing the action as to each respondent. Davis appeals the dismissal orders.[2]

On appeal, Davis does not raise any substantive challenge to the trial court's rulings on the demurrers or to the dismissal orders. Rather, Davis raises a series of arguments related to his claim that respondents purportedly were in default at the time

---

1 Drs. Mongeon and Evtimov are the only respondents in this appeal.

2 The trial court signed separate orders dismissing the action as to each respondent. Each order constitutes an appealable final judgment. (See Code of Civ. Pro, § 581d ["All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case"].)

they filed their demurrers and that the trial court thus erred in sustaining the demurrers. We reject Davis's arguments because there is nothing in the record demonstrating that, at the time respondents filed their demurrers, either respondent was in default or that Davis had requested entry of default as to either respondent. Further, even assuming that Davis had requested entry of default as to respondents, such requests would have been properly denied since the record does not contain evidence demonstrating that Davis properly served either respondent with a summons and complaint. Accordingly, since Davis has not established any error, we affirm the dismissal orders / judgments.[3]

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The complaint*

In April 2017, Davis filed the operative complaint against numerous defendants, including respondents. In a general negligence cause of action, Davis alleged that he had suffered a "heart incident" at a correctional facility in June of 2016. Davis alleged that, as a result of this incident, he was hospitalized at Tri-City Medical Center (Tri-City). While at Tri-City, medical staff performed surgery on Davis's heart and implanted an Automatic Implantable Cardioversion Device (AICD). Davis alleged that the surgery was performed negligently and resulted in his suffering various injuries. Similar factual

---

[3] While this court is sympathetic to the plight of self-represented incarcerated litigants such as Davis whose incarceration and lack of legal representation present challenges in their ability to have their claims heard on the merits, the law mandates that we affirm the judgment in this case for the reasons stated in the text of this opinion.

allegations formed the basis of Davis's intentional tort and deliberate indifference causes of action.

B. *The demurrers*

In July 2017, Dr. Mongeon and Dr. Evtimov each filed a demurrer to the complaint. In his demurrer, Dr. Mongeon contended that Davis's "general negligence" cause of action was "improperly alleged," and should have been brought as a claim for professional negligence. Dr. Mongeon contended that Davis had not alleged sufficient facts to state a claim for an intentional tort or reckless indifference. Dr. Evtimov raised similar arguments in his demurrer.

In August 2017, after Davis failed to oppose the demurrers, the trial court granted both demurrers with leave to amend. The court granted Davis 30 days to file and serve a first amended complaint "addressing the deficiencies noted within the moving papers."

C. *The dismissals*

After Davis failed to file an amended complaint, in September 2017, each respondent filed an application to dismiss the action. On September 19, the trial court entered orders dismissing the action as to each respondent.

D. *The appeal*

In November 2017, Davis filed a timely notice of appeal as to the September 19 orders / judgments.[4]

---

4 Davis lodged numerous exhibits with his opening brief in this court. Dr. Mongeon filed a motion to strike the exhibits. Davis filed an opposition to the motion to strike.

III.

DISCUSSION

The trial court did not err in sustaining respondents' demurrers with leave to amend

Davis raises a series of claims related to his contention that respondents were in default at the time that they filed their demurrers, and that the trial court thus erred in sustaining respondents' demurrers.[5] We consider first Davis's primary claim that respondents were in default at the time that they filed their demurrers, and then consider Davis's other claims related to this contention.

Davis also lodged numerous exhibits with his reply brief. In addition, he filed a motion to augment the record with the exhibits lodged with his reply brief, as well as those lodged with his opening brief. Dr. Mongeon opposed the motion to augment.

We assume, strictly for purposes of this opinion, that all the exhibits that Davis has lodged with this court are properly in the record, since it is clear that Davis cannot prevail on his claims even if all of the exhibits are considered. We emphasize that we do not hold that the exhibits are properly before this court.

[5] While this appeal was pending, Davis filed a motion to strike Dr. Evtimov's respondent's brief or to impose a sanction on Evtimov on the ground that the brief was not timely filed. We deny the motion for the following reasons.

Evtimov's respondent's brief was due on September 17, 2018. Evtimov failed to file his brief by that date. Therefore, pursuant to California Rules of Court, rule 8.220(a), a deputy clerk of this court sent Evtimov a notice on September 21, that stated, "If respondent's brief is not filed within 15 days from the date of this notice, the court will decide the appeal on the record, the opening brief, respondent's brief by Mongeon, and any oral argument by the appellant." (See California Rules of Court, rule 8.220(a) ["If a party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must promptly notify the party in writing that the brief must be filed within 15 days after the notice is sent . . . "].) Evtimov filed his respondent's brief on October 3, which was within 15 days of the rule 8.220(a) notice. Accordingly, there is no basis to strike Evtimov's brief or to impose a sanction on him.

A. *Respondents were not in default at the time they filed their demurrers*

1. *Governing law*

a. *Service of a summons*

A plaintiff suing a defendant in a civil case must serve a summons and complaint on the defendant. (Code of Civ. Proc., § 413.10;[6] *Renoir v. Redstar Corp.* (2004) 123 Cal.App.4th 1145, 1152–1153 (*Renoir*).)

One manner by which a plaintiff may effectuate such service is by mailing the documents to the defendant, and having the defendant return a signed notice of acknowledgement of receipt to the plaintiff in the manner specified by section 415.30.[7] The plaintiff must then file a proof of service form, together with the notice of acknowledgement form, with the court in order to demonstrate such service. (§§ 417.10, subd. (a), 417.30.)

"Knowledge by a defendant of a plaintiff's action does *not* satisfy the requirement of adequate service of a summons and complaint." (*Renoir*, *supra*, 123 Cal.App.4th at p. 1152, italics added.)

b. *Obtaining a defendant's default*

Section 585, subdivision (b) specifies the manner by which a plaintiff may obtain a default against a defendant. The statute provides in relevant part that "*if the defendant has been served* . . . and no . . . demurrer . . . has been filed with the clerk of the court

---

6 Unless otherwise specified, all subsequent statutory references are to the Code of Civil Procedure.

7 This is the sole manner of service that Davis claims he utilized in this case.

within the time specified in the summons, or within further time as may be allowed, the clerk, *upon written application of the plaintiff*, shall enter the default of the defendant." (Italics added.) As is made plain by the italicized words, the clerk shall enter a default only if, among other requirements, the defendant has been served and the plaintiff has filed a written application requesting default.

c. *The effect of entry of a default*

" 'A defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action . . . .' " (*Mackie v. Mackie* (1960) 186 Cal.App.2d 825, 832, fn. 5.) However, "where a pleading is belatedly filed, but at a time when a default has not yet been taken, the plaintiff has, in effect, granted the defendant additional time within which to plead and he is not strictly in default." (*Goddard v. Pollock* (1974) 37 Cal.App.3d 137, 141 (*Goddard*).)

2. *Factual and procedural background*

a. *Davis's proof of service*

Together with his opening brief in this court, Davis lodged a document entitled "Proof of Service of Summons." The document is not file stamped or dated, and it does not identify any person served. With this document is another document entitled "Notice of Acknowledgment of Receipt." Although Davis signed the document as the "Sender," there is no signature above the line labeled, "Signature of person acknowledging receipt . . . ."

b. *Davis's June 6 letter to the clerk of court*

With his opening brief in this court, Davis lodged a letter, dated June 6, 2017, addressed to the clerk of the trial court and signed by him.[8] The letter states as follows:

> "As per the Court's Notice of Case Assignment and Case Management Conference, dated 04-22-2017, the plaintiff in this matter, DOYLE WAYNE DAVIS, did serve upon each named defendant the required documents per the SDSC LOCAL RULE 2.1.5.[9]
>
> "However, as of today's date, no defendant(s) has returned the Proof of Service of Summons to the plaintiff for service upon the Court.
>
> "Plaintiff has attached hereto copies of the required documents[10] to show he has acted in accordance with the rules in attempting to complete service upon all named parties in this matter, with no results.
>
> "Therefore, as an indigent inmate, with no other source of Service of Process, Plaintiff Davis, hereby requests the Court to order that

---

8 The letter is not file stamped.

9 The Superior Court of San Diego County, Local Rule 2.1.5 requires generally that, "within 60 days of the filing of the complaint, all Defendants must be served and proofs of service filed showing service of the Defendants."

10 With the exhibit are a series of summonses (including those naming respondents), as well as a letter dated April 29, 2019 [*sic*] from Davis to "David S. Lee," that states in relevant part:

> "As you are listed as the 'Agent For Service Of Process' for Tri-City Medical Center . . . please find enclosed herewith the Complaint, Summons and other required Court Documents for Process of Service on/for: . . . Robert L. Mongeon . . . Stoimen S. Evtimon, M.D.
>
> "Could you please ensure that these named defendants, et al., are notified of this Service of Summons upon them in the above-entitled case number."

> Service upon each herein named person/party be made by the Clerk of the Court.
>
> "All service attempts made by the plaintiff were executed on and or after May 4, 2017 in this case, and up to and including May 17, 2017, as the last attempt(s) to effect Service of Process upon the defendant(s) et al."

3. *Application*

To begin with, it is undisputed that the record does not contain any *actual* default with respect to either respondent. Thus, while Davis contends that respondents "were/are in default," (some capitalization omitted) that is factually incorrect. To the extent that Davis intends to argue that a defendant who fails to timely respond to a pleading is *automatically* in default, the law is to the contrary. (See § 585, subd. (b) [requiring "written application"]; *Goddard, supra,* 37 Cal.App.3d at p. 141; *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 750 [trial court has discretion to consider untimely filed demurrer].)

Davis's main argument appears to be that the trial court / court clerk erred in denying his request for a default. Citing his June 6, 2017, letter to the clerk of court, Davis claims that "on June 6, 2017, [Davis] motioned the Clerk of the Court, and/or the Court for default judgment."[11] However, nowhere in the letter, which we have quoted in

---

11 Although at various points in his briefing, Davis refers to the June 6 letter as a request for a "default *judgment*," (italics added) we interpret his argument as being that the June 6 letter constituted a request for entry of *default*.

Section 585, subdivision (b), contemplates a two-step procedure for obtaining a default judgment in an action, such as this one, not sounding in contract. First the plaintiff secures entry of the defendant's default; then, upon separate application, the court renders a judgment for a sum as specified in the statute. As discussed in the text,

full in part III.A.2.b, *ante*, did Davis request entry of a default or a default judgment. It is thus clear that Davis did not present a "written application" for default as specified in section 585, subdivision (b). As a result, neither the clerk of court nor the trial court erred in failing to enter a default as to either respondent.

In any event, it is clear from the record that even if Davis *had* requested a default as to either respondent, such a request would have been properly denied. As discussed above, section 585, subdivision (b) specifies that a default may be entered only if, among other requirements, "the defendant has been served . . . ." Citing the proof of service lodged as an exhibit with his opening brief, Davis claims that he "served the Summons and Complaint . . . upon each and every named defendant." However, because the proof of service is not file stamped or dated and does not identify any person served, and there is no evidence that either respondent signed an acknowledgment of receipt of a summons, it is clear that such evidence does not demonstrate that Davis effectuated proper service on either respondent.

While Davis contends in his reply brief that the record demonstrates that he *mailed* the summonses to respondents, even assuming that this is so, mail service *without* the execution of a signed acknowledgement of receipt does not constitute adequate service. (*Thierfeldt v. Marin Hosp. Dist.* (1973) 35 Cal.App.3d 186, 199 (*Thierfeldt*).) As the *Thierfeldt* court explained: "[S]ection 415.30, . . . which authorizes service of summons by mail, expressly predicates the efficacy of such service upon the execution and return

---

there is no evidence in the record that Davis requested entry of a default, the first of these two steps, prior to respondents' filing their demurrers.

of an acknowledgment of service. If the party addressed fails to do so, there is no effective service, [and] he merely becomes liable for the reasonable expenses of service in a more conventional manner." (*Ibid*; see § 415.30, subd. (c) ["Service of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of summons is executed, if such acknowledgment thereafter is returned to the sender"].) Finally, the mere fact that respondents gained knowledge of Davis's lawsuit at some point in the proceedings, does not demonstrate that Davis effectuated proper service on them. (See *Renoir, supra,* 123 Cal.App.4th at p. 1152.)

In sum, it is clear from the record that, at the time each respondent filed his demurrer, neither respondent was in default, Davis had not effectuated proper service of the summons and complaint on either respondent, and Davis had not requested entry of default as to either respondent. Accordingly, Davis has failed to establish that the trial court erred in sustaining the demurrers with leave to amend on the basis that respondents were in default at the time they filed their demurrers.

B. *Davis has not demonstrated that the trial court or court clerk violated a duty to provide him with neutral guidance in connection with the case*

Davis argues, "The Court itself had a duty to appellant in filing a proper Default Judgment request,[12] if it was deemed that appellant a pro se inmate was not submitting required documentation or forms." (Citing *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425 (*Holloway*) [stating "the court appears not to have recognized its discretion to give

12 As explained in footnote 11, *ante,* we interpret Davis's argument to be that the June 6 letter constituted a request for entry of a default.

neutral (and accurate) guidance to Holloway [a incarcerated and self-represented litigant] about the requirements for entry of a default judgment—'reasonable steps, appropriate under the circumstances, . . . to enable the litigant to be heard' "].)

In *Holloway*, the Court of Appeal observed that "[f]rom the record it is apparent Holloway understood some of the requirements for entry of a default judgment (use of mandatory form CIV-100) but not others (a detailed declaration containing the factual basis for his claims and an explanation of the calculation of the damages sought, based on personal knowledge and signed under penalty of perjury, and presentation of a proposed form of judgment)." (*Holloway, supra*, 242 Cal.App.4th at p. 1434.) However, the *Holloway* court explained, "[r]ather than clearly identifying the defects or omissions in the moving party's papers, as is routinely done in tentative rulings in cases where the parties are represented by counsel, however, the notices and orders sent to Holloway when his papers were rejected only obliquely or, in one repeated instance, incorrectly notified him of his errors." (*Ibid.*) Under these circumstances, the Court of Appeal concluded that a remand was appropriate to allow the plaintiff the opportunity to file a proper request for an entry of a default judgment against the defendants. (*Id.* at p. 1433.)

Holloway does not demonstrate that the trial court erred in this case. Unlike in *Holloway*, Davis did not properly effectuate service on either respondent (*Holloway, supra*, 242 Cal.App.4th at p. 1428); he did not make "repeated attempts" (*id.* at p. 1433) to obtain a default as to respondents prior to their filing demurrers; the June 6 letter does not state, or even suggest, that Davis was seeking to obtain respondents' defaults; and Davis has not demonstrated that the trial court or clerk responded to the June 6 letter in a

manner that was misleading, "oblique[ ]," or "incorrect[ ]" (*id.* at p. 1434.).[13] Under these circumstances, we conclude that Davis has not demonstrated that the trial court or clerk violated any duty owed to Davis as a self-represented incarcerated litigant.

C. *Davis is not entitled to reversal due to respondents' purported "culpable conduct," in failing to timely answer the complaint*

Davis argues "defendants[']failure to answer in a timely manner was due to culpable conduct which requires reversal . . . ." (Some capitalization omitted.) The gist of this argument is a rehash of Davis's argument that we rejected in part III.A, *ante*, namely, that the trial court "lost jurisdiction," to sustain respondents' demurrers with leave to amend, given their alleged failure to timely answer the complaint. We reject this argument for the reasons stated in part III.A, *ante*.

D. *This court lacks jurisdiction over defendants who are not parties to this appeal*

Davis requests that we conclude that the trial court and the court clerk "exceeded their lawful jurisdiction by granting relief via demurrer for defaulted defendants," including those defendants that are not parties to this appeal. We lack jurisdiction to consider Davis's claims as to defendants who are not parties to this appeal with respect to orders from which no notice of appeal has been taken in this case. (See, e.g., *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 670 ["timely filing of an appropriate notice of appeal or its legal equivalent is an absolute prerequisite to the exercise of appellate jurisdiction"].)

---

13 Indeed, the Register of Action from the case does not indicate that the court received or filed the June 6 letter from Davis. Nor is there any evidence in the record that the court or clerk responded to Davis's letter.

IV.

DISPOSITION

The judgments are affirmed. In the interests of justice, each party is to bear his own costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.